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Federal Communications Commission
Office of Secretary

Linda L. Haller, Esq.
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 616
Washington, D.C. 20554

Dear Ms. Haller:

We understand that the Commission will soon begin implementing new Section 257 of the Communications Act concerning the elimination of entry barriers for entrepreneurs and other small businesses in the provision and ownership of information services. As part of that proceeding, the Commission should implement new Section 222(e) which requires that local exchange carriers ("LECs") make subscriber list information available to publishers of competing directories. This action conforms with the views espoused by Representatives Joe Barton and Bill Paxon that LECs' power over subscriber list information constitutes the type of entry barrier which Section 257 was designed to eliminate.

The enclosed paper details the extreme difficulties faced by entrepreneurial telephone directory publishers when attempting to obtain subscriber listings and compete with LECs. More specifically, the paper describes many of the ways in which LECs abuse their monopoly over subscriber information to the detriment of competing directory publishers. Such tactics range from outright refusals to sell updated listings (e.g., a new resident or new business address) to making listings available but only with a series of onerous conditions.

Section 222(e) was enacted specifically to end such abusive practices by LECs. As made clear in the attached paper, members of Congress, other LECs, and the courts have recognized that LECs' monopoly on subscriber information is an entry barrier to competing directory publishers. That entry barrier should be eliminated as part of the Section 257 proceeding by requiring LECs to make subscriber list information available at a fair price to competing directory publishers.

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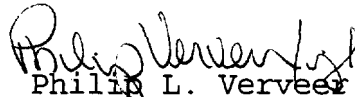
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Linda L. Haller, Esq.
April 4, 1996
Page 2

If you would like to discuss the matter more fully, please
feel free to call the undersigned at (202) 328-8000.

Sincerely,

A handwritten signature in dark ink, appearing to read "Philip L. Verveer". The signature is written in a cursive style with a large initial "P".

Philip L. Verveer
Theodore C. Whitehouse
Russell L. Smith
Michael F. Finn

**IMPLEMENTATION OF SECTION 222(E) OF THE COMMUNICATIONS ACT:
ACCESS TO SUBSCRIBER LIST INFORMATION**

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I. INTRODUCTION

The Telecommunications Act of 1996 heralds the beginning of true competition in telecommunications. One area in which Congress expressly mandated that competition occur is the provision of telephone directories - an area that had previously been, and continues to be, dominated by local exchange carriers ("LECs"). Under new Section 222(e), LECs must make subscriber list information available under nondiscriminatory rates, terms, and conditions, to competing directory publishers.

In order to enter and compete in the yellow page market, competing directory publishers -- those not affiliated with incumbent LECs -- must have reasonable and fair access to the subscriber information. In other words, the publishers must be able to obtain the information and updates (new addresses, new subscribers, etc.) in a timely manner and at a reasonable price.¹ As will be shown, implementation of Section 222(e) should, for the first time, allow independent directory publishers to compete on equal footing with the incumbent LECs who have historically used their position to prevent competition in the directory market.²

¹ During the debate on the Conference Report on the Telecommunication Act of 1996, Rep. Joe Barton of Texas, a member of the Conference Committee on the legislation, discussed the basis for Section 222(e) as follows: "Subscriber list information is essential to publishing directories. Carriers that charge excessive prices or set unfair conditions on listing sales deprive consumers and advertisers of cheaper, more innovative, more helpful directory alternatives." See 142 Cong. Rec. H.1160 (daily ed. Feb. 1, 1996), attached as exhibit 1.

² This paper details some of the abuses that LECs have practiced historically.

II. BACKGROUND

Telephone directory advertising -- essentially yellow pages advertising -- has become a \$10 billion per year industry.³ It is the lifeline through which local businesses -- plumbers, movers, doctors, restaurants, etc. -- reach their customers.⁴ The foundation of this business is subscriber information - the name, address, and telephone number of each subscriber. It is this information which LECs must have both to assure accurate and complete "white pages" directories, and to contact businesses and market their yellow page advertising.

As the sole provider of telephone service in their area, LECs "obtain[] subscriber information quite easily."⁵ Persons desiring telephone service cannot receive a telephone number without first applying to the telephone company and supplying their names and addresses.⁶ That information is then placed into a computer database where it is "constantly revised" and

³ See "Yellow Pages Revenues Expected To Surpass \$10 Billion In 1996," Business Wire (April 2, 1996), attached as exhibit 10.

⁴ See, e.g., David Segal, "Nightmares on Flower Street; a New Jersey Firm's Tactics Anger Virginia Florists and Legislators", Wash. Post., Feb. 14, 1996, at D1 (discussing importance of yellow page advertising to the \$13 billion-a-year flower market).

⁵ See Feist Publications v. Rural Tel. Serv., 499 U.S. 340, 343 (1991) (striking down copyright protection for subscriber information in telephone white pages).

⁶ See id.

"compiled."⁷ The subscriber list information is the essence of the "business" of the LEC - that information must be obtained and maintained in order to provide telephone service.⁸ The LEC by definition thus has monopoly control over its subscriber information.⁹

III. LECs HAVE HISTORICALLY ABUSED THEIR POWER TO PREVENT COMPETITION IN THE DIRECTORY MARKETS

As observed by the Supreme Court, competing directory publishers are not telephone companies, are without monopoly status, and "therefore lack[] independent access to any subscriber information."¹⁰ U S WEST has stated that "[i]t would be virtually impossible for a competitive directory publisher to [produce a directory] without its being able to obtain use of the up-to-date basic listings."¹¹ In light of the above, it is not surprising that Congress passed Section 222(e) because LECs have

⁷ See Hutchison Tel. Co. v. Fronteer Directory Co., 770 F.2d 128 (8th Cir. 1985) (pre-Feist case holding white page directories worthy of copyright protection). U S WEST has indicated that "up-to-date basic listing information is easily and relatively inexpensively gathered" and is "compile[d] and continuously update[d]." See Mot. of U S WEST For Permission To File Brief Amicus Curiae in BellSouth Advertising & Pub.. v. Donnelley Information Pub., Case No. 85-3233-CIV-SCOTT (March 2, 1987) at 5 ("U S WEST Amicus Mot."), attached as exhibit 2.

⁸ See Feist, 499 U.S. at 342 (discussing requirement that phone books be issued).

⁹ Independent publishers possess only 6.4% of the yellow pages market. See "Yellow Pages Revenues Expected To Surpass \$10 Billion In 1996," Business Wire (April 2, 1996), attached as exhibit 10.

¹⁰ See Feist, 499 U.S. at 343.

¹¹ See U S WEST Amicus Mot. at 6, attached as exhibit 2.

"used pricing and other terms to try to limit [] competition" in the directory market.¹²

A. Many LECs refuse to sell or license their listings

In the past, some LECs have chosen to prevent competition by refusing to sell or otherwise license their listings to competing directory publishers.¹³ For example, Rochester Telephone, a large independent LEC, refused to provide listings to directory publishers competing with its wholly-owned directory publishing subsidiary until January of 1996.¹⁴ As of March 1996, U S WEST was refusing to provide competing directory publishers with the business owners' name and related headings classifications, reserving such information for its affiliate.¹⁵ Moreover, prior to the Supreme Court's Feist decision, publishers who copied the

¹² See Floor statement of Representative Bill Paxon, 142 Cong. Rec. E184 (daily ed. Feb. 6, 1996) (discussing reasons for passing Section 222(e)), attached as exhibit 3.

¹³ See, e.g., Rural Telephone Service v. Feist Publications, 957 F.2d 765 (10th Cir.), cert. denied 506 U.S. 984 (1992) (finding no antitrust violation in refusal to deal due to errors in the district court).

¹⁴ Other LECs behaved similarly. See, e.g., Letter from Paul Grauer, President of Wilson Telephone Co. to Ridenour and Knobbe (March 5, 1986) ("we still have no intention of selling our directory listings to anyone"), attached as exhibit 5.

¹⁵ See Letter from Burel Schnaberg, President/CEO of USA Western Directories, Inc. to Carol Hill, Ass'n of Directory Publishers (March 13, 1996), attached as exhibit 6.

listings -- following a refusal to deal -- faced potential liability under the copyright laws.¹⁶

B. Many LECs who offer their listings for sale do so on terms that are tantamount to a refusal to deal

Many LECs provide listings but impose pricing and other terms that are so excessive as to constitute a virtual refusal to deal. In 1983-84, both New York Telephone and Ohio Bell sold listings at \$0.01 per listing. By 1991-92, listings were \$0.20 and \$0.36, respectively, an increase of 2000% and 3,600%.¹⁷ In a 1991 affidavit, the president of a Michigan yellow pages publisher noted that Michigan Bell had increased its listing

¹⁶ LECs traditionally invoked the Copyright Law in order to prevent others from utilizing their subscriber information. For example, in the 1930s, the Pacific Telephone & Telegraph Company successfully prevented a competing telephone directory publisher from issuing various telephone directories in California. Leon v. Pacific Tel., 91 F.2d 484 (9th Cir. 1937) (white page directory published in numerical order as opposed to plaintiff's directory which was alphabetical). Similar results occurred in Hutchinson Tel. Co. v. Fronteer Directory Co., 770 F.2d 128 (8th Cir. 1985) (white page directory), and United Tel. Co. v. Johnson Publishing Co., 855 F.2d 604 (8th Cir. 1988) (white page directory). However, in Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340 (1991), the Supreme Court held that the Copyright Law could not be construed to prevent copying of factual information from telephone white page directories. In BellSouth Advertising & Publishing Corp. v. Donnelley Information Publishing, Inc., the Eleventh Circuit held, en banc, that copyright law does not prevent copying of factual information from the yellow pages. See 999 F.2d 1436 (11th Cir. 1993), cert. denied, 114 S.Ct. 943 (1994).

¹⁷ In United Telephone Co. v. Johnson Publishing Co., 855 F.2d 604 (8th Cir. 1988), the court noted that the telephone company raised the price of its listings nearly 500% in a single year, from \$0.10 to \$0.49 per entry.

price from \$0.05 to \$0.45 over a three year period.¹⁸ Similarly, Southwestern Bell, noting that competing directories were vulnerable to "expense driven attacks," tripled its listings prices twice within four years until they reached \$0.50 cents per listing.¹⁹ ALLTEL Corp., a large independent LEC, currently sells its listings for \$0.98 cents per listing.²⁰ It should be noted that LECs have offered to sell their listings to non-directory users such as mail order companies for prices far below those offered to competing directory publishers, a clear example of discriminatory pricing.²¹

Additionally, Southwestern Bell and other LECs have required, as a condition of obtaining any listings, that competing directory publishers buy listings for a far greater area than actually needed, rather than just for the regions to be covered in the competing directory.²² As noted by the Fifth Circuit, those actions have the effect of "substantially

¹⁸ See Affidavit of Frank Noverr (Aug. 21, 1991), attached as exhibit 7. Mr. Noverr also noted that many LECs refused to provide listings on any terms.

¹⁹ Great Western Directories, Inc. v. Southwestern Bell Tel. Co., 63 F.3d 1378, 1388 (5th Cir. 1995), vacated and remanded in part on other grounds 74 F.3d 613 (5th Cir. 1996). At the same time, Southwestern Bell lowered the price it charged advertisers 40%.

²⁰ See Affidavit of Rick Lewis, President and Chief Executive Officer of White Directory Publishers, Inc. (April 2, 1996), attached as exhibit 14.

²¹ See Section IV.B.

²² See Great Western, 63 F.3d at 1387; United Telephone Co. v. Johnson Publishing Co., 855 F.2d 604 (8th Cir. 1988).

increas[ing] the fixed cost of operation" for "small independents."²³

C. LECs have imposed particularly burdensome conditions for the provision of updated listings

Updated information -- change of addresses, new businesses, etc. -- is indispensable to a telephone directory publisher, both to maintain the accuracy of its overall database and because (1) people moving into a community are most likely to refer to yellow page advertising and (2) new businesses are particularly likely to need such advertising. Consequently, many LECs historically refused to provide updated information.²⁴ ALLTEL Corp., a large independent LEC, continues to withhold updated listings.²⁵ GTE, which has long refused to provide updated listings, recently stated it would make them available; however, "it was unable to say when."²⁶

²³ See Great Western, 63 F.3d at 1387.

²⁴ In 1987, for example, the then-President and CEO of Southwestern Bell Yellow Pages, Inc. stated that GTE would not sell updated listings to his company for use in a competing directory. See Affidavit of A.C. Parsons (Dec. 18, 1987), attached as exhibit 4. As of 1991, NYNEX and GTE, among others, refused to provide daily updates to competing directory publishers. See exhibit 8. At that time, Southern Bell refused to provide updates to residential listings which competing directory publishers need in order to deliver their directories to new arrivals. See exhibit 8.

²⁵ See Affidavit of Rick Lewis, President and Chief Executive Officer of White Directory Publishers, Inc. (April 2, 1996), attached as exhibit 14.

²⁶ See id.

Those LECs which do provide listings often make them available on only the most onerous of conditions. Southwestern Bell, for example, required:

Independents . . . to purchase both the residential and business updates [at \$1.00 per update]; independents also had to contract to take updates for a period of two years; and if the publisher stopped taking updates within the two years, the publisher could not obtain listings again for another two years.²⁷

Southwestern Bell is not alone in offering updates at prices so high as to make them unavailable as a practical matter.²⁸

LECs also trumpet the fact that independent publishers are unable to obtain updates. For example, GTE's promotional materials distributed to yellow pages advertisers seek to discourage advertising in independent directories by stating that only GTE's directory has the most accurate or up-to-date information:

Is the [independent] directory publisher affiliated with the local telephone company [thus] assuring the most up-to-date listings possible?

Is there any assurance that the directory will contain the most complete listings?²⁹

Likewise, a Southwestern Bell handbook for its yellow page sales representatives advises representatives to inform potential

²⁷ Great Western, 63 F.3d at 1384, 1387.

²⁸ As of 1991, certain Bell Atlantic companies charged as much as \$2.50 per update. See exhibit 8.

²⁹ See exhibit 9.

advertisers that listings in independent publishers' directories "are outdated on publication date."³⁰

D. LECs have committed other anticompetitive acts

Other exclusionary terms imposed by LECs include allowing the information to be used only one time, thereby forcing competing publishers to buy the listings for the LEC's entire directory anew each year, despite the fact that most of the listings were obtained previously from the LEC. Moreover, many LECs seek to restrict or regulate the kinds of directories published by their competitors. Still others impose short deadlines by which the listings must be published in the competing directory, thereby foreclosing use of listings for advertising sales leads. LECs have also attempted to force competing publishers, as a condition of acquiring listings, to print a disclaimer on the cover of their directory that the directory is not associated with the LEC.³¹ Such a disclaimer serves only to undermine consumer confidence in the competing directory. Finally, it should be noted that LECs have not limited their questionable acts to independent publishers. As found by New York's highest court, NYNEX attempted to create its yellow page subsidiary in a manner to evade state regulation.³²

³⁰ See Southwestern Bell manual for training sales representatives, attached as exhibit 19.

³¹ See Affidavit of A.C. Parsons, then-President and CEO of Southwestern Bell Yellow Pages, attached as exhibit 4.

³² See New York Telephone Co. v. Public Service Commission of New York, 72 N.Y.2d 419 (Court of Appeals 1988). See also (continued...)

IV. CONGRESS ENACTED SECTION 222(e) TO CURB LECs' ANTICOMPETITIVE BEHAVIOR AND ENSURE ACCESS TO SUBSCRIBER INFORMATION

Section 222(e) was passed specifically to prevent LECs from continuing their anticompetitive behavior regarding directory publishing. As noted by Representative Paxon, Section 222(e) "is a simple requirement to protect an area of telecommunications where there has been competition for more than a decade, but where service providers have used pricing and other terms to try to limit that competition. Now we are prohibiting such anticompetitive behavior."³³ Section 222(e) provides:

Subscriber List Information. - . . . a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.

The term "subscriber list information" is defined in new Section 222(f)(3) as any information:

(A) identifying the listed names of subscribers of a carrier and such subscribers' telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses, or classifications; and

³²(...continued)
Northwestern Bell Telephone Co., 371 N.W.2d 563, 567 (Minn. Ct. App. 1985) (affirming Minnesota PUC's refusal to allow U S WEST subsidiary to "avoid [PUC's] scrutiny" through various subsidiary arrangements).

³³ See Floor statement of Representative Bill Paxon, 142 Cong. Rec. E184 (daily ed. Feb. 6, 1996) (discussing reasons for passing Section 222(e)), attached as exhibit 3.

(B) that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.

Thus, Section 222(e) "guarantees independent publishers access to subscriber list information at reasonable and nondiscriminatory rates, terms and conditions from any provider of local telephone service."³⁴

A. The FCC must implement Section 222(e) within 15 months

Section 257, as enacted by the Telecommunications Act of 1996, requires the Commission to identify and eliminate market entry barriers for entrepreneurs and other small businesses within 15 months of the Act's passage. Among the types of barriers to be eliminated are barriers in (1) the provision and ownership of information services or (2) the provision of parts or services to information services providers.

LEC control over access to subscriber information is the type of entry barrier required to be eliminated by Section 257. Representative Paxon, for example, characterized Section 222(e) as "one of those covered by section 257 of the conference report that requires that the FCC make rules that identify and remove barriers to entry for companies involved with providing telephone and information services."³⁵ Likewise, Representative Barton observed that:

³⁴ See Conf. Rep. No. 230, 104th Cong., 2d Sess 205.

³⁵ See Floor statement of Representative Bill Paxon, 142 Cong. Rec. E184 (daily ed. Feb. 6, 1996) (discussing reasons for passing Section 222(e)), attached as exhibit 3.

Under section 257 of the bill, within 15 months from the date of enactment , the FCC is to undertake rulemakings to identify and remove barriers to entry for small businesses involved with telecommunications and information services. Clearly, the requirements of section 702³⁶ with respect to subscriber list information fall within this rulemaking requirement.³⁷

Additionally, both other LECs and the courts have noted that LECs' monopoly on subscriber information is an entry barrier. U S WEST has likened control over up-to-date listings to "a bottle neck or an essential facility."³⁸ The former President of Southwestern Bell's yellow page company (and the National Yellow Pages Service Association) has stated that subscriber list information "can be obtained from no other practical source" than the telephone company.³⁹ The Supreme Court has reached a similar conclusion, noting that competing publishers "lack[] independent access to any subscriber information."⁴⁰ For that reason, an Arizona court required a LEC to provide U S WEST, which was attempting to offer a competing directory, with subscriber

³⁶ Section 702 of the 1996 Telecommunications Act added Section 222(e) to the Communications Act.

³⁷ See Floor Statement of Representative Joe Barton, 142 Cong. Rec. H.1160 (daily ed. Feb. 1, 1996), attached as exhibit 1.

³⁸ See U S WEST Amicus Mot., attached as exhibit 2.

³⁹ See Affidavit of A.C Parsons, attached as exhibit 4. In 1986, the Vice President of an affiliated Southwestern Bell yellow pages company similarly stated that "it is not possible for a directory publisher to truly compete with a telephone company affiliated with a directory publisher without access on basically equal terms to customer listing information." Affidavit of T.H. Avery (June 16, 1986) at 4, attached as exhibit 11.

⁴⁰ See Feist, 499 U.S. at 343.

information. In so doing, the court characterized access to subscriber listings as an "essential facility [which] cannot reasonably or practically be duplicated from other sources."⁴¹ In light of the above, LECs' control over subscriber list information is the type of barrier which Section 257 requires to be eliminated within 15 months.

B. As part of implementation, the FCC should require that the price charged competing publishers be based on the incremental cost of delivery

Section 222(e) requires that subscriber list information be made available to directory publishers at "reasonable rates." As part of its implementation of Section 222(e), the Commission should mandate that a "reasonable rate" is one based on the incremental cost of providing the materials. Such a requirement is necessary -- as recognized by two conferees to the 1996 Act -- in order for Section 222(e) to curb fully LECs' anticompetitive behavior.

One particular form of unfair behavior engaged in by LECs is the raising of rivals' costs.⁴² LECs use the market power inherent in their control of subscriber listing information to

⁴¹ See U S West Direct Co. v. Citizens Utilities Co., No. CV 88-15997 at 2 (Arizona Super. Ct., Aug. 17, 1989), attached as exhibit 18.

⁴² For a more thorough discussion of the harms from the unfair raising of rivals' costs (increased prices to consumers, decreased competition, etc.), see Steven C. Salop and David T. Scheffman, Raising Rivals' Costs, 73 Am. Econ. Rev. 267 (1983); Thomas G. Krattenmaker and Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price, 96 Yale L. J. 209 (1986); and Steven C. Salop and David T. Scheffman, Cost-Raising Strategies, 36 J. Indus. Econ. 19 (1987).

force higher costs upon competing directory publishers, thereby preventing such competitors from competing effectively against the LECs, (if not forcing them out of the market altogether).⁴³ By raising rivals' costs, a dominant firm immediately advantages itself through increased profits or market share as its now high-cost rivals reduce their output (e.g., the dominant firm may raise its price to that of its high-cost rivals thereby reaping higher profits or it may lower its price thereby capturing market share).⁴⁴ A dominant firm may capture both increased profits and market share when it has the ability -- as do LECs -- to elevate rivals' costs by increasing the price of an input that rivals may obtain only from the dominant firm.⁴⁵

Given LECs' exclusive control over subscriber listings, it is not surprising that their pricing patterns appear aimed at raising competing directory publishers' prices. In litigation in

⁴³ See generally, Raising Rivals' Costs, 73 Am. Econ. Rev. at 267.

⁴⁴ See, e.g., Raising Rivals' Costs, 73 Am. Econ. Rev. at 267.

⁴⁵ The Seventh Circuit has found it "per se unlawful" for an electrical trade association to raise costs of rival non-member firms by requiring such firms to contribute to a fund maintained by the association's members for their own benefit. The court noted that such action would increase costs to the non-members, lead to higher prices to purchasers of electrical work, and "higher profits" for members of the association both because there were more funds available to the association in the form of the non-member contributions and because the reduction in competition would enable members to capture more of the market. See Premier Elec. Const. v. National Elec. Contractors Ass'n, 814 F.2d 358, 368 (7th Cir. 1987) (remanding for a determination as to whether association and union had agreed to impose fee on non-members).

1988, Southwestern Bell admitted that its costs were less than one cent per listing.⁴⁶ Yet, that same year, GTE was charging \$0.35 cents per listing plus the actual costs of programming, computer runs, paper, shipping, etc., and an additional \$100.00 fee per directory.⁴⁷ In 1991, the annual per listing prices charged to independent publishers ranged from \$0.08 cents per listing to \$2.50 per update listing.⁴⁸ In light of Southwestern Bell's cost of less than \$0.01 per listing, it would appear that the prices charged independent publishers have no relationship to cost and are designed solely to exploit the LECs' market power and handicap competing publishers.

This conclusion is bolstered by the fact that LECs charge far less per listing when selling to firms that are not competitors in the directory business. For example, in 1990, the U S WEST telephone companies charged between \$0.06½-\$0.07½ cents for noncompeting direct mail use but 515% more (\$0.40 cents per listing) for publication in a competing directory.⁴⁹ In contrast, AT&T charged directory publishers only \$0.01 per listing plus the actual cost to provide a listing of subscribers

⁴⁶ See White Pages Plans, Plaintiff's Exhibit T108 in Great Western Directories, attached as exhibit 12.

⁴⁷ See 1988 GTE Directory Listing License Agreement, attached as exhibit 13.

⁴⁸ See exhibit 8.

⁴⁹ See exhibit 15. U S WEST is not alone in this type of price disparity. In 1991, Ameritech charged independent publishers between \$0.45 cents and \$1.25 per listing while charging only \$0.04½-\$0.06 cents per listing to firms desiring the listings for direct mail and telemarketing use.

to its "800" number services.⁵⁰ Similarly, providers of simple name, address, and telephone number data charge as little as one cent per listing.⁵¹

Given such abuses by LECs, it is imperative that a "reasonable rate" be defined as one based on incremental cost. In the long run, incremental costs reflect the true economic cost of a service and "ensure efficient entry and utilization of the telecommunications infrastructure."⁵² For those reasons, Representative Barton, a conferee on the 1996 Act, stated:

As the FCC determines what constitutes a "reasonable" price for listings, it seems clear that the most significant factor in that determination should be the actual or incremental cost of providing the listing to the independent publisher. This approach assures that providers get back what it actually costs them to deliver the listings to a publisher without being allowed to "load" the price with unrelated costs and cross-subsidies.

Representative Bill Paxon, another conferee on the Act, reached a similar conclusion:

Since the FCC will soon be considering how to interpret the language in Section 222(e) to prevent future problems with the sale of subscriber list information to independent publishers, I would like to emphasize

⁵⁰ See exhibit 16.

⁵¹ See Letter from Jim Bryant, President of Compact Publications, Inc. to David Isner, President of Providence Publishing Corp. (July 31, 1991), attached as exhibit 17.

⁵² See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, FCC 95-505 at ¶ 47, Notice of Proposed Rulemaking, CC Docket No. 95-185, (rel. Jan. 11, 1996) (long run incremental cost of a service is the "theoretical foundation for efficient pricing"). See also Alfred D. Kahn, I The Economics of Regulation: Principles and Institutions, 85 (1970); Stephen Breyer, Regulation and Its Reform, 52 (1982).

one key point. I have consistently sought to assure that in determining what constitutes a reasonable rate under this bill, the most significant factor should be the incremental cost of delivering that listing to the requesting party.

In light of the above, adoption of incremental cost would prevent LECs from abusing their power and effectuate Congress' intent.

V. CONCLUSION

The FCC must implement Section 222(e) within 15 months. In so doing, it should ensure that the price charged per listing is based on the incremental cost. This accords with Congressional intent and will prevent LECs from continuing to abuse their control over subscriber lists.

EXHIBIT LIST

- Exhibit 1 Floor Statement of Representative Joe Barton
(Feb. 1, 1996)
- Exhibit 2 Motion of US West For Permission To File Brief
Amicus Curiae in BellSouth Advertising & Pub. v.
Donnelley Information Pub. (March 2, 1987)
- Exhibit 3 Floor Statement of Representative Bill Paxon
(Feb. 6, 1996)
- Exhibit 4 Affidavit of A.C. Parsons, then-President and CEO
of Southwestern Bell Yellow Pages (Dec. 18, 1987)
- Exhibit 5 Letter from Paul Grauer, President of Wilson
Telephone Co. & Ridenour and Knobbe (March 5,
1986)
- Exhibit 6 Letter from Burel Schnaberg, President/CEO of USA
Western Directories, Inc. to Carol Hill, Ass'n of
Directory (Publishers (March 13, 1996)
- Exhibit 7 Affidavit of Frank Noverr, President of Noverr
Publishing, Inc. (Aug. 21, 1991)
- Exhibit 8 Telephone Company Prices for Subscriber Listings
Data (1983-1991)
- Exhibit 9 GTE Promotional Materials
- Exhibit 10 "Yellow Pages Revenues Expected to Surpass \$10
Billion in 1996," Business Wire (April 2, 1996)
- Exhibit 11 Affidavit of T.H. Avery, then-Vice President and
General Manager of Southwestern Bell Media, Inc.
(June 16, 1986)
- Exhibit 12 Southwestern Bell White Pages Plans
- Exhibit 13 1988 GTE Directory Listing License Agreement
- Exhibit 14 Affidavit of Rick Lewis, President/CEO White
Directory Publishers, Inc. (April 2, 1996)
- Exhibit 15 Letter from Karis Hastings, Counsel for
Teleconnect USA to Nancy Garrison, U.S. Dept. of
Justice (Feb. 27, 1990)
- Exhibit 16 AT&T 800 Service Listing File License Agreement
(1991)

- Exhibit 17 Letter from Jim Bryant, President of Compact Publications, Inc. to David Isner, President of Providence Publishing Corp. (July 3, 1991)
- Exhibit 18 US West Direct Co. v. Citizens Utilities Co., No. CV-88-15997 (Ariz. Super. Ct., Aug. 17, 1989)
- Exhibit 19 Southwestern Bell Manual - Training Sales Reps.

EXHIBIT 1



United States
of America

Congressional Record

PROCEEDINGS AND DEBATES OF THE 104th CONGRESS, SECOND SESSION

Vol. 142

WASHINGTON, THURSDAY, FEBRUARY 1, 1996

No. 14

House of Representatives

CONFERENCE REPORT ON S. 652, TELECOMMUNICATIONS ACT OF 1996

(Mr. BARTON of Texas asked and was given permission to revise and extend his remarks.)

Mr. BARTON of Texas. Mr. Speaker, I want to also express my support to the leadership on both sides of the aisle that have pushed this legislation. Special thanks to my good friend, JACK FIELDS, who is retiring at the end of this session and this is going to be his legacy. He gets triple gold stars for his work.

I want to give a special thought on the local control of the right-of-way. The gentleman from Michigan, Mr. STUPAK, and myself and Senator HUTCHISON in the Senate have worked on that. I had a phone conversation with the president of the League of Mayors this morning, the gentleman from Knoxville, TN. They are supporting the bill.

I would urge all Members who have had some concerns expressed by their mayors to be supportive. We have worked out language in the bill and in the conference report that gives cities absolute guarantees to control their right-of-way and to charge fair and reasonable nondiscriminatory pricing for the use of that right-of-way.

This is a good piece of work, it is comprehensive, it is revolutionary. As my good friend, the gentleman from Virginia [Mr. BOUCHER], said, this

opens up seamless interactive communications for all Americans, and I would urge an "aye" vote on the bill.

Mr. Speaker, section 702 of the bill adds a new section 222(e) to the Communications Act which would prohibit any provider of local telephone service from charging discriminatory and/or unreasonable rates, or setting discriminatory and/or unreasonable terms or conditions, for independent directory publishers buying subscriber list information.

Subscriber list information is essential to publishing directories. Carriers that charge excessive prices or set unfair conditions on listing sales deprive consumers and advertisers of cheaper, more innovative, more helpful directory alternatives.

Under section 257 of the bill, within 15 months from the date of enactment, the FCC is to undertake rulemakings to identify and remove barriers to entry for small businesses involved with telecommunications and information services. Clearly, the requirements of section 702 with respect to subscriber list information fall within this rulemaking requirement.

As the FCC determines what constitutes a "reasonable" price for listings, it seems clear that the most significant factor in that determination should be the actual, or incremental cost of providing the listing to the independent publisher. This approach assures that providers get back what it actually costs them to deliver the listings to a publisher without being allowed to "load" the price with unrelated costs and cross-subsidies.